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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SAMI AMMARI et al.,

Plaintiffs and Appellants,

v.

STATE FARM GENERAL INSURANCE  
COMPANY,

Defendant and Respondent.

B256804

(Los Angeles County  
Super. Ct. No. BC478793)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Frederick C. Shaller, Judge. Affirmed.

Silverberg Law Corporation and Peter M. Cho for Plaintiffs and Appellants.

LHB Pacific Law Partners, Clarke B. Holland, Matthew F. Batezel and Aparajito  
Sen for Defendant and Respondent.

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## INTRODUCTION

Plaintiffs Sami Ammari and Hard Money, Inc. appeal from the judgment entered in favor of defendant State Farm General Insurance Company (State Farm) after the trial court granted State Farm's motion for summary judgment. Plaintiffs failed to raise any disputes of material fact and so State Farm is entitled to judgment as a matter of law. Accordingly, we affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *Ammari and Rivero*

Sami Ammari and Amaya Rivero owned and operated Oasis Thai Spa, which offered a variety of spa and salon services. Rivero applied for and held the business license for Oasis Thai Spa. Rivero was also an account holder for the business' bank account and was responsible for paying all business-related taxes.

In February 2006, Rivero entered into a commercial lease agreement to rent space at Laurel Canyon Boulevard in Studio City, California to operate Oasis Thai Spa. The lease term ran from April 1, 2006 to June 30, 2014.

### 2. *The insurance policy*

State Farm issued a business policy (Policy No. 92-BX-T218-2) to "Ammari, Sami DBA Oasis Thai Spa," covering business personal property including fixtures, up to \$400,000, subject to a \$5,000 deductible. The policy period ran from April 23, 2010 to April 23, 2011. The coverage did not extend to buildings.

The application for the insurance policy identified the applicant as Ammari and Oasis Thai Spa, an "individual," and identified the customer as "Ammari, Sami & Oasis Thai Spa DBA Oasis Thai Spa." Ammari's "acknowledgement" indicated that by submitting the application, he agreed that he read the application and his statements therein were correct.

### 3. *Ammari and Rivero end their relationship*

Ammari and Rivero were a couple for a long time and had four children together. They ended their relationship. On February 3, 2010, Rivero and Ammari, personally, entered into a written "Agreement" stating that Rivero "will transfer all of her rights and

obligations under [the] *landlease* to Sami Ammari, who agrees to take over all rights and obligations of Amaya C. Rivero *associated with said landlease.*” (Italics added.) (The Agreement.) The Agreement does not state when the transfer would occur or provide for transfer of ownership rights in the spa. On September 17, 2010, Rivero stated that she held a financial interest in Oasis Thai Spa and that the lease to the business premises was in her name.

#### 4. *The vandalism claim*

Ammari notified State Farm that someone spray painted the walls and equipment at Oasis Thai Spa on August 9, 2010. State Farm representatives inspected the premises and, on August 16, 2010, made a partial, initial payment of \$6,793.84 for the vandalism. State Farm reinspected the premises on August 25, 2010, accompanied by a contractor, Tri-Tech Restoration. Tri-Tech Restoration submitted an estimate of \$104,598.61 to completely clean and restore the premises. On November 10, 2010, State Farm paid Ammari \$92,804.77 on the vandalism claim. The two payments, accepted and deposited by Ammari, without issue or complaint as to the named payee, totaled \$99,598.61 (\$104,598.61 less the \$5,000 deductible).

#### 5. *The theft claim*

Ammari reported to State Farm that a theft from the premises occurred on August 12, 2010. Ammari contends that Rivero was the perpetrator and that she took equipment, products and money. Rivero declared that she went to Oasis Thai Spa to take possession of the business and its contents. She brought a locksmith so that she could change the locks to the business to prevent Ammari from gaining access. Before departing for the spa, Rivero consulted with the Los Angeles Police Department who advised her to go after business hours to avoid a confrontation with Ammari. She opened the door with her own set of keys and discovered that much of the interior had been vandalized with spray paint. She promptly reported the vandalism and waited for the police. When officers arrived, they informed Rivero that the police had already taken a report of the vandalism. Rivero proceeded to remove items from the premises. She stated that the business and all contents inside, including all equipment, electronics, furniture, supplies, merchandise,

clothing, accessories, and money, belonged to her. Rivero believed she was taking possession of her own things.

#### *6. The lease assignment*

Ammari filed a lawsuit against Rivero in September 2010, after the vandalism and theft occurred, alleging that Rivero refused to sign over the lease in breach of the Agreement. On September 23, 2010, Rivero executed a document assigning her interest in the lease to Hard Money, Inc. Ammari owns Hard Money, Inc. The landlord consented to the assignment, as required by the lease, on October 6, 2010. Ammari believes that Rivero's assignment of the lease to Hard Money, Inc. transferred all of her rights in the spa as well. The assignment of lease does not contain any provisions transferring Rivero's ownership interest in Oasis Thai Spa or its assets.

On August 29, 2012, State Farm communicated to Ammari its conclusion that Ammari had made multiple material misrepresentations when he presented his vandalism and theft claims.

#### *7. The instant lawsuit*

Ammari's operative complaint, filed after the insurance policy expired, asserted causes of action against State Farm for breach of contract and tortious breach of the implied covenant of good faith and fair dealing (bad faith) for State Farm's refusal to pay policy benefits on his vandalism and theft claims. A third cause of action for declaratory relief sought reformation of the policy to change the named insured from Ammari to Hard Money, Inc. The original complaint named Ammari as the plaintiff. The first amended and operative complaint added Hard Money, Inc. as a plaintiff.

#### *8. State Farm's motion for summary judgment*

State Farm moved for summary judgment on the ground that there was no dispute of fact that it had paid Ammari the full amount of the vandalism claim. With respect to Ammari's theft claim, State Farm asserted that there is no dispute that Rivero's conduct on August 12, 2010 did not qualify as a "theft" for purposes of coverage under the policy. State Farm's motion established that Rivero did not appropriate any property with a criminal intent to steal; rather she was a co-owner of the Oasis Thai Spa and took

possession of the business and its contents under a good faith claim and color of right to the property. Therefore, State Farm argued, as a matter of law it was not liable for breach of contract and bad faith concerning its handling of either the vandalism or the theft claims, and so it was entitled to summary judgment of those causes of action. As an alternative ground for summary judgment, State Farm asserted that Ammari's material misrepresentations voided the policy and eliminated any right to receive policy benefits. Finally, with respect to the cause of action to reform the policy, State Farm asserted first, that the policy had already expired thereby mooting the issue. Second, State Farm argued it was undisputed that the application for the policy identified the applicant and customer as "Ammari, Sami & Oasis Thai Spa DBA Oasis Thai Spa." Hard Money, Inc was nowhere referenced in the application. As a matter of law, therefore, there was no mutual mistake of the contracting parties about the identity of the insured to justify reforming the policy to name Hard Money, Inc. as an insured.

In opposition to the summary judgment motion, plaintiffs did not dispute that State Farm paid Ammari for the vandalism claim. Rather, plaintiffs argued that State Farm failed to pay benefits for "all vandalism related damages." As for the theft claim, plaintiffs argued that there was a triable issue about whether Rivero was an owner of the business at the time of the theft. The opposition did not discuss the reformation cause of action.

To demonstrate a triable factual issue with respect to Rivero's status as a co-owner of the business, plaintiffs submitted Ammari's declaration. In paragraph 2, Ammari declared that "[1] In February 2010, Amaya Rivero and I agreed that effective immediately, all of her interest in the business located at the Laurel Canyon property at issue in this action would be relinquished to me or to any entity controlled by me. [2] That entity is Plaintiff Hard Money, Inc. [3] As part of that relinquishment, Ms. Rivero agreed to assign her interest under the commercial lease for the property to me and/or Hard Money, Inc. [4] Ms. Rivero also went to the Los Angeles Police Commission to cancel and remove all permits for the business under her name."

Plaintiffs cited this paragraph nearly every time they indicated they disputed a material fact in State Farm's separate statement.

The trial court granted State Farm's summary judgment motion. In so doing, it ruled that the first sentence of paragraph 2 of Ammari's declaration was an inadmissible legal conclusion of a lay person and that the last sentence of paragraph 2 was inadmissible hearsay and lacked personal knowledge. Plaintiffs' timely appeal ensued.

### CONTENTIONS

Plaintiffs contend summary judgment was improper because triable issues of material fact remain about (1) whether a theft occurred, and (2) whether plaintiffs' representations were willful and material.

### DISCUSSION

#### 1. *Principles of Summary Judgment*

Summary judgment is properly granted when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A moving defendant meets its burden by showing one or more essential elements of the cause of action cannot be established or there is a complete defense thereto. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*).) Once the moving party has met its initial burden, the burden shifts to the opponent to show a triable issue of one or more material facts exists as to that cause of action or a defense. (*Aguilar*, at p. 849; § 437c, subd. (p)(2).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850.)

We review a grant of summary judgment de novo, and decide independently whether the facts not subject to a dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) Toward that end, "we 'liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.'" [Citations.] (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.) We consider all of the

evidence submitted in support of and in opposition to the motion, except evidence to which an objection has been made and sustained by the court, and all uncontradicted inferences reasonably deducible from the evidence. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We conclude, upon our independent review of the evidence, that State Farm is entitled to judgment as a matter of law.<sup>1</sup>

**2. *Summary Judgment of The Breach of Contract And Bad Faith Causes of Action Was Properly Granted.***

**a. *The Theft Claim***

In the context of the law of theft, “[t]he intent to steal or *animus furandi* is the intent, without a good faith claim of right, to permanently deprive the owner of possession. [Citation.]” (*People v. Davis* (1998) 19 Cal.4th 301, 305.) However, “a claim of right to take disputed property negates the criminal intent necessary for theft. [Citation.]” “[A] claim of right vitiates criminal charges where ‘the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable.’ [Citation.]” (*Barnett v. State Farm General Ins. Co.* (2011) 200 Cal.App.4th 536, 544-545 (*Barnett*), citing *People v. Tufunga* (1999) 21 Cal.4th 935, 952, fn. 4 [defense of claim of right applies to all theft-related offenses].) “[I]n the insurance context, ‘the fact that the alleged wrongdoer acted under a bona fide claim of title removes the criminal character from his or her act, and, therefore, takes the loss out of the coverage of a policy covering loss via such offenses.’ [Citation.]” (*Barnett*, at p. 545.)

**(i) *State Farm carried its burden as moving party.***

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<sup>1</sup> On appeal, State Farm argues that plaintiffs have forfeited any challenge to the trial court’s ruling concerning the vandalism claim and the reformation cause of action because plaintiffs raised no arguments about those issues in their briefing. However, we must address all of the causes of action on which State Farm sought summary judgment irrespective of whether a contention was raised in plaintiffs’ appellate brief because our review is de novo, and because on appeal from the grant of summary judgment, we apply “ ‘the same three-step process required of the trial court.’ ” (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.)

There is no factual dispute that Rivero did not take the property with an intent to steal. She entered premises that she was leasing and for which she had keys. Her uncontroverted declaration indicates that she believed she owned the business and its contents. She not only brought a locksmith with her to change the locks, but she consulted with the police in advance about taking possession of the items. (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 644 [“A lack of concealment is evidence that a defendant has a good faith belief in his or her right to the property at issue”].) Rivero openly took possession of the property based on her subjective claim of right and with a good faith belief that the property belonged to her. Accordingly, no covered theft occurred.

(ii) *Plaintiffs did not carry their burden to raise a triable issue of material fact.*

On appeal, plaintiffs contend they demonstrated a triable issue of material fact about whether a theft occurred because they disputed that Rivero was an owner of the Oasis Thai Spa business in August 2010 when she removed the items. They argue that Rivero and Ammari had agreed in early 2010 that Ammari would assume full ownership and management of the business, with the result that Rivero did not own the property she took, and by inference, did not have a good faith belief that she was an owner. As evidence of this fact, plaintiffs cite the separate statement and argue that Rivero’s “cancellation of certain business permits on file with the Los Angeles Police Commission reflect that” Rivero had already transferred her interest in the business to Ammari.<sup>2</sup>

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<sup>2</sup> The Agreement is not evidence that Rivero transferred her interest in the Oasis Thai Spa business to Ammari before August 2010 when she removed the personal property from the premises. In the absence of conflicting extrinsic evidence, interpretation of a contract is a question of law for the court to decide. (*Wu v. Interstate Consolidated Industries* (1991) 226 Cal.App.3d 1511, 1514-1515.) Reading the contract, it unambiguously provides that Rivero “*will*” transfer her rights and obligations in the lease. (Italics added.) The Agreement makes no mention of any ownership rights in the Oasis Thai Spa business. Nor does it state *when* the transfer of Rivero’s interests in the lease would occur. The lease was assigned in September 2010 and so the assignment did



The only suggestion in the record that Rivero canceled the business' permits is paragraph 2 of Ammari's declaration in which he stated: "Ms. Rivero also went to the Los Angeles Police Commission to cancel and remove all permits for the business under her name." Apart from the fact that this declaration does not indicate when Rivero canceled the permits, as noted, the trial court sustained State Farm's evidentiary objections to this sentence, ruling that the declarant lacked personal knowledge, and the statement lacked foundation or was hearsay. (Evid. Code, §§ 403, 702 & 1200.) In response, plaintiffs' attorney argued at the hearing on the summary judgment motion that he had attempted to obtain the Police Commission records but was unable to do so in time to submit them with the opposition to the summary judgment motion. Counsel acknowledged that he did not request an extension of time to file his opposition under section 437c, subdivision (h).

On appeal, rather than challenge the trial court's evidentiary ruling, plaintiffs cite *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, to argue that the trial court erred in failing, *sua sponte*, to continue the hearing on the summary judgment motion so that plaintiffs could obtain documents from the Los Angeles Police Commission to show a factual dispute.

"When a party makes a good faith showing by affidavit demonstrating that a continuance is necessary to obtain essential facts to oppose a motion for summary judgment, the trial court must grant the continuance request. [Citation.]" (*Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1428; Code Civ. Proc., § 437c, subd. (h).)<sup>3</sup> An "application to continue the motion to obtain necessary discovery may also be

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not serve to divest Rivero of her interest in the lease in August 2010 when she removed the personalty.

<sup>3</sup> Code of Civil Procedure section 437c, subdivision (h) reads, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may

made by ex parte motion at any time on or before the date the opposition response to the motion is due.” (§ 437c, subd. (h).)

“ ‘Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under [Code of Civil Procedure] section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court’s denial of appellant’s request for a continuance for abuse of discretion.’ [Citation.]” (*Park v. First American Title Co.*, *supra*, 201 Cal.App.4th at p. 1427.)

Plaintiffs never submitted an affidavit or requested a continuance to enable them to obtain the subpoenaed documents from the Police Commission. Plaintiffs never requested a continuance at any time before the hearing itself, let alone before the deadline for filing their opposition papers, and never gave an explanation for their omission. Plaintiffs did not even orally request a continuance at the hearing on the summary judgment motion. They merely proposed to make an offer of proof. An offer of proof is unavailing as the purpose of summary judgment is to look at the evidence contained in the moving and opposing affidavits and declarations. (See *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.) The trial court did not abuse its discretion in failing *sua sponte* to continue the summary judgment hearing. Consequently, nothing in the record disputes that Rivero had a good faith belief that she owned the spa and its assets in August 2010.

(iii) *State Farm is entitled to judgment as a matter of law.*

In opposing the summary judgment motion, plaintiffs failed to dispute that Rivero had an ownership interest in the business or that Rivero had a good faith belief that she had a claim of right to the business and its contents on August 12, 2010. Hence, the removal of the items from the premises was neither a theft nor a covered loss under the

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also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.”

policy. State Farm did not breach the contract of insurance or act in bad faith in denying coverage for Ammari's theft claim. (*Barnett v. State Farm General Ins. Co.*, *supra*, 200 Cal.App.4th at p. 544.)

b. *The Vandalism Claim*

State Farm's moving papers demonstrated that the insurer fully paid Ammari for the vandalism loss. Plaintiffs do not dispute this. Instead, they argued that State Farm did not pay all of the damages. Yet, their opposition did not set forth any facts to indicate that the payment on the vandalism claim was not sufficient. Furthermore, at the hearing on the summary judgment motion, plaintiffs' attorney admitted in court that plaintiffs did not submit to State Farm any additional costs to repair the premises. Therefore, as a matter of law, State Farm is not liable for breach of the insurance policy contract or bad faith with respect to the vandalism claim.

Summary judgment of the breach of contract and bad faith causes of action was properly granted.

**3. *Summary Judgment of the Cause of Action For Reformation Was Properly Granted.***

Reformation of a contract is allowed when, "through fraud or mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties . . . ." (Civ. Code, § 3399.) "The purpose of reformation is to correct a written instrument in order to effectuate a common intention of both parties which was incorrectly reduced to writing. [Citation.]" (*Lemoge Electric v County of San Mateo* (1956) 46 Cal.2d 659, 663.)

In its moving papers, State Farm asserted that there was no mistake that would justify reforming the policy to make Hard Money, Inc. the named insured. State Farm's moving papers included Ammari's application for the policy, which shows that Ammari and Oasis Thai Spa were the applicant and "customer." Nowhere in the application is Hard Money, Inc. referenced. Furthermore, Ammari acknowledged that he read the application and the statements therein were correct. The policy that was issued in response to this application was consistent with the application. Therefore, State Farm

has demonstrated that there was no mutual mistake about the named insured on the policy.

Shifting the burden to plaintiffs, their opposition relied on paragraph 2 of Ammari's declaration to argue that Hard Money, Inc. is the successor in interest to the named insured. Nothing in paragraph 2, or indeed in any paragraph of Ammari's declaration, indicates that Hard Money, Inc. was the successor to Oasis Thai Spa or that State Farm was ever notified of a change in ownership. Accordingly, plaintiffs failed to raise a dispute of material fact concerning a mistake in the policy. As a matter of law, therefore, summary judgment of the cause of action for declaratory relief to reform the policy was properly granted.

Plaintiffs also contend that there are triable issues about whether Ammari's misrepresentations were willful and material, which misrepresentations were the basis of State Farm's attempt to void the policy. Plaintiffs cannot defeat summary judgment by showing a triable issue of fact about whether State Farm could void the policy because that issue became immaterial once plaintiffs failed to demonstrate triable issues of fact on their causes of action for breach of contract, bad faith, and reformation of the policy. (*Romero v. American President Lines, Ltd.* (1995) 38 Cal.App.4th 1199, 1203 ["the opposing party may not defeat summary judgment by attempting to generate a factual dispute as to immaterial issues"].)

DISPOSITION

The judgment is affirmed. Respondent State Farm General Insurance Company to recover costs of appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.